80-596

Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO. _____

_____

CAROL O'DONNELL,
PETITIONER,

versus

STATE OF FLORIDA,
RESPONDENT.

_____

PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEALS,
FOURTH DISTRICT, STATE OF FLORIDA.

_____

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QUESTIONS FOR REVIEW

I. Whether the Petitioner was denied her basic rights under the First and Fourteenth Amendments of the United States Constitution by failure of the Florida courts to order suppression of the seized evidence where the facts show that the initial stop of the Petitioner's vehicle was made on the basis that its occupants were: (1) not known to be residents of the area by the local police; (2) displayed curiosity at the goings-on of the police by staring at them as their vehicle passed by; and (3) the driver of the Petitioner's vehicle was a black male.

II. Whether the record in the Florida court was so devoid of any articulable facts and their rational inferences, that there was no evidence establishing a reasonable suspicion, and that the stopping of the Petitioner's vehicle amounted to an unconstitutional deprivation under the First and Fourteenth Amendments of the United States Constitution as being totally unreasonable, and further being done as a pretext.

LISTING OF PARTIES BELOW

The parties to the consolidated proceedings in the District Court of Appeal, Fourth District, were as follows:

(a) The Appellants:

(1) Daniel Madison
CASE NO. 78-2429

(2) Glynnis Mitchell
CASE NO. 78-2429

(3) Carol O'Donnell
CASE NO. 78-2371

(b) The Appellee:

(1) State of Florida

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CONSTITUTIONS CITED:

United States Constitution, Amendment IV 9, 17

United States Constitution, Amendment XIV, Section I 9, 17

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28 U.S.C. §1257(3) 8

REFERENCE TO OFFICIAL REPORTER

The decision of the District Court of Appeal, Fourth District, Florida, affirming the trial court's denial of the motion to suppress is reported at 378 So.2d 1311. The case is reported only at this citation, and does not appear otherwise.

JURISDICTIONAL STATEMENT

The judgment of the District Court of Appeal, Fourth District, State of Florida, was entered on January 4, 1980, affirming the trial court's order denying the Petitioner's Motion to Suppress, and thus upholding the Petitioner's conviction. A timely petition for rehearing was thereafter filed and was denied by the District Court of Appeal on February 6, 1980. A timely petition for writ of certiorari was thereupon taken to the Supreme Court of Florida which declined jurisdiction and denied certiorari on August 13, 1980. The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS RELIED UPON

I. AMENDMENT IV
CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be seized.

II. AMENDMENT XIV, SECTION I
CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On December 23, 1977, at approximately 9:12 p.m., Sergeant Armold of the Parkland Police Department, pulled over a van driven by a black male for an alleged traffic violation in an all-white, sparsely settled residential area in the City of Parkland, Florida. The road area where the van was pulled over was a stretch of unlit dirt road just wide enough for two cars to pass, flanked on both sides with a built-up dirt mound, which bordered a canal on one side and a ditch on the other. A search of the van revealed over one thousand pounds of marijuana, and the driver was placed under arrest (R24-R34). The reason given for the stop by Sgt. Armold was that the driver was black

and he was not recognized as a resident of Parkland. [1]

After calling for back-up units, three more police vehicles arrived (a total of five vehicles) and all parked on the roadway behind and in front of the van with their signal flashers on. Sgt. Armold explained what he had found to the other units, and Chief Davis of the Parkland Police Department decided to call the Organized Crime Unit of the Sheriff's Department before proceeding further. While waiting for the Organized Crime Unit, approximately one-half hour later, another van approached the assembled police cars. The driver of the second van was a black male, and had two female passengers with him in the front seat, one white; one black.

---

1. This stop and the fruits of the search were suppressed in an unrelated case.

According to the testimony of Chief Davis given at the Motion to Suppress, the second van approached at approximately three to five miles per hour, and at a distance of about two hundred feet, the Chief, by judging the position of its headlights, determined that the passenger-side wheels had momentarily touched the dirt mound on the right side of the road. Then, as the van passed by where he was standing and crossed the road to get by the police cars, Chief Davis testified that the van's three occupant's (the Petitioner included) displayed an "unusual curiosity" by staring at what the police were doing. The Chief then noticed the wheels of the van momentarily touch the side of the road once again as it went by. At this point, he ordered it stopped,

ostensibly for the purpose of determining whether the driver was in "good condition to operate the vehicle." [2] (R80)

The deputy who stopped the vehicle testified that he did not see the vehicle break any traffic laws. (R19) Sgt. Armold, who also had watched the van approach, testified that he saw no erratic driving whatsoever, and thought the van was stopped by Chief Davis because: its occupants were not Parkland residents; its driver was black; and it was driven in the same direction as the

---

2. It should be noted that although Chief Davis claimed that the reason he stopped the vehicle was to determine the driver's condition, the arrest affidavit prepared by Chief Davis did not mention this as the cause for the stop, and instead stated that the van was driving "slowly and suspiciously" and was "not known in the area." (R141 - R143)

first van. (R39 - R45) He also testified that it was his own policy to stop any vehicle at night in that area with people he did not recognize. (R45)

After the second van was stopped, its driver, Daniel Madison, was found to be without a driver's license. He was immediately ordered under arrest by Chief Davis, and a closer examination of the van revealed some fifteen hundred pounds of marijuana. The two female occupants, Carol O'Donnell and Glynnis Mitchell, were then placed under arrest.

One June 23, 1978, a Motion to Suppress the evidence was heard before the trial court. A written motion previously filed on behalf of the Petitioner and the Co-defendants alleged that the stopping of the van was an illegal pretextural arrest without any reasonable suspicion, and was thus

"seized contrary to the Fourth Amendment" (R157), being in violation of the "Federal Constitution." (R158) The constitutional issue was further raised orally at the Motion to Suppress by the Petitioner's trial counsel who argued:

> ". . . What I think is the standard to be applied in this case and generally accepted throughout the United States under the Fourth Amendment indicated that the Fourth Amendment bars . . . random vehicle stops . . ." And that "before the government may single out an automobile and stop it there must be specific facts justifying the intrusion." (R108 - R109)

The trial judge then reserved ruling on the motion and on August 1, 1978, denied the motion in a written order that held that "only unreasonable searches are condemned by the Constitution" but that no "search had occurred in this case as the marijuana was found in plain view after the stop." The trial judge further held that although:

> "technical reasons could be found to invalidate this seizure . . . . but for the immediate decision made by Chief Davis, in excess of one thousand pounds of marijuana would have found its way into the illicit market . . . ."

Due to the denial of the Motion to Suppress, the Petitioner plead no contest to the charges and reserved her right to appeal its denial. (R206) An appeal was taken to the District Court of Appeal, Fourth District, State of Florida, and docketed as Case No. 78-2731. It was later consolidated with the appeal of the two Co-defendants, Madison and Mitchell, as the questions of law and fact raised before the court were identical.

The briefs of the parties raised the constitutional issue before the

District Court of Appeal and asserted, inter alia, that: [3]

> "The trial court erred in denying the Defendant's Motion to Suppress where there is no basis presented for the preliminary stop of the Defendant's vehicle and subsequent search of that vehicle in violation of the Fourth and Fourteenth Amendments to the United States Constitution . . ."

The District Court of Appeal, after hearing argument on the case per curiam affirmed, without written opinion (one judge concurring), thus adopting the order of the trial court as its own. Certiorari was denied by the Florida Supreme Court.

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3. Brief of Madison, p.6.

ARGUMENT

I. The instant case represents a landmark in the ability of two state courts to blatantly ignore the tenets of the Fourth Amendment in the face of an admission that the seized evidence, although suppressible for "technical reasons," would be upheld due to the "difficult position in which police officers frequently find themselves involved." (R181)

By this action, the courts have knowingly engrafted a rule of convenience over a right guaranteed by the Constitution, leaving the Fourth Amendment as nothing more than a framework of empty words.

In effect, the trial court justified the stop by the results of the later seizure. This is plainly an unconstitutional violation of the Fourth Amendment. Sibron v. New York, 392 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.ed.2d 917 (1968); Johnson v. United States, 333 U.S. 10, 16-17, 68 S.Ct. 367, 370, 92 L.ed. 436 (1948).

II. The instant case has allowed the state court to establish an apparent rule of "less than a reasonable suspicion" on the basis of a series of facts which neither independently or taken together constitute specific articulable facts or their rational inferences to support the constitutional standard. Instead, the court has found that a vehicle driven on a sparsely travelled road by persons unknown to the local

police may be stopped for that reason alone. Clearly, this is a dangerous practice that cannot be permitted as it raises a "grave threat" to the rights of every citizen to unmolested free travel by automobile. See, Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 1400-1401, ____ L.ed.2d ____ (1979). Moreover, inherent in a review of the testimony at the Motion to Suppress was the fact that the van was stopped due to the fact that its occupants included two black persons in a wholly white residential neighborhood.

To credit a racial or ethnic characteristic as a justification for a stop is impermissable. In United States v. Brignoli-Ponce, 422 U.S. 873, 884-885, 95 S.Ct. 2574, 2582, 45 L.ed.2d.607 (1975), this court was faced with a situation where a roving border stop was made on the single factor that the vehicle's occupants were of Mexican ancestry. The court held that this was a constitutionally insufficient basis to justify a reasonable suspicion of illegal activity, and that stops of a vehicle would be permissable only where officers were "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion . . . ." United States v. Brignoli-Ponce, supra at 422 U.S. 884-885, 95 S.Ct., 2582.

This holding was echoed in Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, ____ L.ed.2d. ____ (1979), where the petitioner was stopped for identification while walking away from another man in an alley in an area with a high incidence of drug traffic on the basis that he "looked suspicious and we had never seen that subject in the area before." In Brown, supra, the court held that the Fourth Amendment was violated since the stop was not based on any objective criteria. Brown v. Texas, supra, at 99 S.Ct., 2641.

Here, the facts are not so different from the Brignoli-Ponce, and Brown V. Texas cases, supra, and boil down to nothing more than a bare suspicion or curiosity on the part of the police unsupported by any rational inferences obtained from specific articulable facts.

Under these circumstances, it would be unjust to deny certiorari as such a denial would be interpreted as tacit approval of the state court decisions. Moreover, the granting of certiorari would be a means to clarify and extend the basic rationale behind the "roving border patrol" cases to all those cases where persons were stopped on the basis that they were unknown individuals in an otherwise local area. Such a clarification seems needed -- at least in the State of Florida.

APPENDIX

IN THE
DISTRICT COURT OF APPEAL
FOURTH DISTRICT
STATE OF FLORIDA
CASE NO. 78-2429

DANIEL MADISON and GLYNNIS MITCHELL,
Appellants,

versus

STATE OF FLORIDA,
Appellee.

---

and

CASE NO. 78-2731
CAROL O'DONNELL,
Appellant,

versus

STATE OF FLORIDA,
Appellee.

Decision filed January 4, 1980.

Consolidated appeals for the Circuit Court for Broward County; Thomas M. Coker, Jr., Judge.

PER CURIAM.

AFFIRMED.

MOORE and BERANEK, JJ., concur.
ANSTEAD, J., concurs specially with opinion.

ANSTEAD, J., concurring specially:

I feel compelled to concur in the majority's affirmance of the trial court's order denying a motion to suppress, on the authority of Gustafson v. State, 243 So.2d 615 (Fla. 4th DCA 1971).

IN THE
CIRCUIT COURT
17TH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA
CASE NO. 77-7179CF

STATE OF FLORIDA,
Plaintiff,

versus

DANIEL MADISON,
CAROL O'DONNELL, and
GLYNNIS MITCHELL,
Defendants.

ORDER ON MOTION TO SUPPRESS

THIS CAUSE coming on to be heard on the Defendants' Motion to Suppress, and after the taking of testimony from Deputy Sheriff Villanueva, Sgt. Arnold and Chief Davis of the Parkland Police Department, and Detective Madge of the Lauderhill Police Department; and hearing argument of counsel, and receiving of briefs, and after duly considering same, the Court finds:

1. That the Parkland Police Department stopped a van in their city and found same to contain in excess of a thousand pounds of marijuana. This stop is not the subject matter of this motion.

2. That subsequent to this stop, Chief Davis was summoned to the scene at approximately 9:30 p.m. to 10:00 p.m.; other police units also arrived at the scene.

3. That sometime thereafter a second van approached the area and passed at an extremely slow rate of speed, with the occupants therein indicating an uncommon interest in the goings-on.

4. That the roadway is not paved at this location, having a berm and gully on one side of the road, and a canal immediately adjacent to the other. As the second van passed, it struck the berm on one side of the road and the canal edge of the other, after it had passed the stopped vehicles.

5. Chief Davis instructed Deputy Sheriff Villanueva to stop the vehicle, since he had a marked police unit and Chief Davis did not, to make sure the driver was possessed of his normal faculties, due to the dangerous condition of the roadway and location.

6. That upon being stopped and the driver exiting the vehicle, it was determined that he had no

valid driver's license. As he exited, Chief Davis detected an odor which he identified as marijuana, and looking into the vehicle noticed bales, which he also identified as marijuana. Deputy Villanueva made a similar determination from his observations. The driver and both passengers were subsequently arrested for possession of marijuana.

7. That Parkland is a small community and the Chief, as well as the officers of the police department, know practically every vehicle and face that are normally there.

8. That the roadway being travelled by the defendants was not a throughway and would normally be travelled only by residents of the area, and neither the occupants of the van, nor the van, was indigenous to the area.

9. That under appropriate circumstances police officers have the right, as well as the duty, to stop motor vehicles. See Gustafson v. State 243 So.2d 615; State v. Stevens 354 So.2d 1244; F.S. 901.151.

10. That many circumstances in which a police officer finds himself require immediate action, and reaction, and decisions made

under such circumstances cannot be weighed as if they were made in the sterility of a courtroom or a law library.

11. That while "we require police officers to be reasonable, we too must be reasonable." See Chippas v. State 180 So.2d 355.

12. That only unreasonable searches are condemned by the constitution.

13. That while technical reasons could be found to invalidate this seizure (the court finding that no search existed, being that a "plain view" situation was present), the Court is of the view that for too long some

Courts seem to have been afflicted with "tunnel vision," and this Court cannot help but be more realistic in its approach to a difficult position in which police officers frequently find themselves involved.

14. That but for the immediate decision made by Chief Davis, in excess of one thousand pounds of marijuana would have found its way into the illicit market to the detriment of society and the enrichment of the defendants. The Court cannot find that decision unreasonable and, in so finding, it is thereby;

ORDERED and ADJUDGED that the Motion to Suppress be, and the same is hereby DENIED.

DONE and ORDERED in Chambers, Broward County Courthouse, Fort Lauderdale, Florida this 1st day of August, 1978.

/s/
Thomas M. Coker, Jr.
Circuit Court Judge

IN THE
DISTRICT COURT OF APPEAL
FOURTH DISTRICT
STATE OF FLORIDA
CASE NO. 78-2429

DANIEL MADISON and GLYNNIS MITCHELL,
Appellants,

versus

STATE OF FLORIDA,
Appellee.
_____/

and

CASE NO. 78-2731
CAROL O'DONNELL,
Appellant,

versus

STATE OF FLORIDA,
Appellee.

BY ORDER OF THE COURT:

ORDERED that the Appellant, Daniel Madison's January 15, 1980 Motion for Rehearing and for Clarification is hereby denied; and further,

ORDERED that the Appellant, Carol O'Donnell's January 15, 1980 Petition for Rehearing and/or Clarification of Appeal is hereby denied.

I HEREBY CERTIFY the foregoing is a true copy of the original court order.

/s/
CLYDE L. HEATH,
CLERK

IN THE
DISTRICT COURT OF APPEAL
FOURTH DISTRICT
STATE OF FLORIDA
CASE NO. 78-2429

DANIEL MADISON and GLYNNIS MITCHELL,
Appellants,

versus

STATE OF FLORIDA
Appellee.

---

and

CASE NO. 78-2731
CAROL O'DONNELL,
Appellant,

versus

STATE OF FLORIDA,
Appellee.

BY ORDER OF THE COURT:

ORDERED that the Motion for Consolidation filed January 8, 1979, is hereby granted, and the above-styled case numbers are now consolidated and are to proceed under the time schedule for a full appeal and according

to the requirements of
Fla.R.App.P. 9.140.

I HEREBY CERFITY the foregoing
is a true copy of the original
court order.

/s/
CLYDE L. HEATH,
CLERK

IN THE
CIRCUIT COURT
17th JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA
CASE NO. 77-7179CF-B

STATE OF FLORIDA,
Plaintiff,

versus

CAROL O'DONNELL,
Defendant.

CERTIFICATION OF NOLO PLEA

THIS CAUSE came before me upon the oral motion of defense counsel to certify the fact, for the appellate record, that the plea of nolo contendere made by the Defendant in this case specifically reserved the right to appeal the order of this Court denying her Motion to Suppress, and this Court being fully advised in

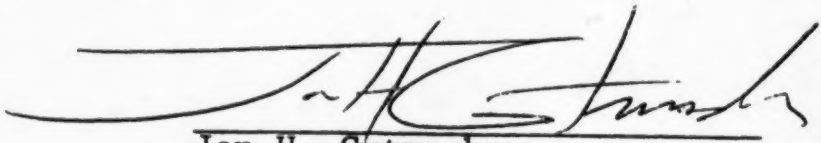
the facts, and realizing that such certification would save unnecessary transcript costs, it is hereby certified that the facts heretofore related are correct, and that a right to appeal the denial of suppression exists.

DONE and ORDERED this 15th day of December, 1978.

/s/
Thomas M. Coker, Jr.
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Petition for Writ of Certiorari were mailed to the attorney for the Respondent, The State of Florida, Department of Legal Affairs, 111 Georgia Avenue, West Palm Beach, Florida 33401, This 10 day of October, 1980.



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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLE

CASE NO. 80-596

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CAROL O'DONNELL

Petitioner,

v.

STATE OF FLORIDA

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, FOURTH DISTRICT, STATE OF FLORIDA

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QUESTION PRESENTED

I and II

WHETHER THE INITIAL STOP OF THE VEHICLE WHEREIN PETITIONER WAS AN OCCUPANT WAS VALID PURSUANT TO THE FOURTH AND FOURTEENTH AMENDMENT TO THE CONSTITUTION.

STATEMENT OF THE CASE

At approximately 9:40 p.m. on December 23, 1977, Chief Davis of the Parkland Police Department arrived at the scene of an arrest (R. 62). A beige van had been pulled over for driving through a stop sign (R. 26). The stop occurred 1 1/2 miles after the stop sign on a two lane dirt road with a ditch on one side and a canal on the other (R. 25-27). The canal is only two feet from the edge of the road and the swale starts at the road's edge (R. 25).

Chief Davis received a report from Sergeant Armold (R. 32,63). When Armold approached the van, after the stop, he observed burlap bales which, through prior experience, he knew contained marijuana (R. 28-31). Armold also detected the odor of marijuana

(R. 31). Armold saw approximately fifteen 100-pound bales (R. 31). He then placed one, Terry Brooks, the black driver of the beige van, under arrest (R. 27,31,34,37).

Sergeant Armold told Chief Davis of the large amount of marijuana in the van (R. 62). Armold also told Davis he believed another vehicle, an older model, dark blue of green Pontiac sedan had led the van into the city. (R. 35-37,63).

The city of Parkland has a population of 375 and it is 8 to 10 square miles in area (R. 34). Chief Davis testified he can recognize some 90% of the vehicles in Parkland (R. 63). There were no blacks in Parkland in December, 1977 (R. 38).

Approximately 10 to 15 minutes after

Chief Davis' arrival at the scene a northbound light blue Ford Van was spotted by Davis approximately 250 to 300 feet south of his position (R. 65, 70). Chief Davis, aware that a canal and a ditch flanked the road, observed the van run off the eastern edge of the roadway as it was travelling north (R. 66). The right hand wheels of the van hit the berm on the side of the road (R. 68). The berm is composed of dirt and sand six to eight inches high (R. 68). Chief Davis considered it dangerous for the wheels of a vehicle to run off on the berm since the vehicle could be pulled off the road causing a spill (R. 68). The van continued north at approximately 5 miles per hour and Chief Davis observed the vehicle run up on the berm just north of his location (R. 69). Davis did not

recognize the van, a late model, light blue Ford (R. 70). He noted that the occupants of the van were all paying attention to the cars on the side of the road even though police blue lights were not on, only emergency flashers were blinking. Davis also noted that none of the passengers were from Parkland (R. 70-78).

After observing the van leave the road the second time Chief Davis requested that Broward County Sheriff Deputy Villanueva stop the vehicle. Davis wanted to ascertain whether the driver was in a condition to operate the vehicle (R. 71). Deputy Villanueva, who had not taken particular note of the van until Chief Davis asked him to stop the vehicle, complied with the request (R. 7-9). The deputy requested

a driver's license of the driver (R. 9). The driver stated he had no license (R. 9). At that point Chief Davis approached the scene (R. 72). After learning that the driver had no license, Davis asked the occupants to exit the van. Through the opened driver's door Chief Davis saw bales and smelled the odor of marijuana (R. 73-75,76). Due to his nine years of experience as a police officer and prior contacts with similar bales Chief Davis believed the bales contained marijuana (R. 75-76).

Chief Davis testified he did not recognize any of the van's passengers as residents of Parkland when the van passed (R. 78). The dirt road on which the stop took place, 82nd Terrace is not a through road. It is all residential. There are no businesses or ware-

houses on the road (R. 81).

Deputy Villanueva testified Chief Davis told him the van was stopped because it was weaving (R. 11).

ARGUMENT

I and II

Quoting out of context from the trial court's order on her motion to suppress, Petitioner claims the trial court justified the stop in the case sub judice by the results of the plain view seizure which followed the stop. Petitioner also contends the trial court denied her motion to suppress erroneously in that specific articulable facts to justify the stop were not proven.

Petitioner's argument interprets the evidence in the light most favorable to her cause and shuns evidence and logical inferences which conflict with her defense theories. Petitioner's approach conflicts with well settled principles of appellate review. Factual findings must be sustained if there is substantial evidence to support

them, viewing the evidence in the light most favorable to the Government. Glasser v. United States, 315 U.S. 60, 80 (1942).

When viewed in context the trial court's order does not justify the seizure by its fruits. Rather the trial court, following precepts laid down by this Court in Delaware v. Prouse, 440 U.S. 748 (1979) and Terry v. Ohio, 392 U.S. 1 (1968), found that the search was reasonable after examining the circumstances surrounding the seizures.

As noted by this Court in Prouse at 659:

> The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations.

Respondent submits that the officers in the case sub judice had reasonable grounds to stop the van wherein

Petitioner was riding to ascertain whether the driver was violating the laws of Florida by driving while intoxicated. The van was seen leaving the dirt road twice by a police officer (R. 63,68-69). The officer was aware that a ditch flanked the road on one side and that a canal was on the other side (R. 66). The wheels of the van hit a berm, composed of six to eight inches of dirt and sand (R. 68). The Officer considered it dangerous for the wheels of a vehicle to run off on the berm because the vehicle could be pulled off the road when the wheels on one side lost traction. The result would be a spill (R. 68). Despite the fact that the van was proceeding at approximately 5 miles per hour the van hit the berm twice (R. 68-69).

Given the hazards presented by the dirt road on which the van was proceeding and the difficulties the driver displayed by twice running off the road despite a very low speed, the police officers were fully justified in stopping the van to ascertain the condition of the driver.

See, Gustafson v. State, 243 So.2d 615 (Fla. 4DCA 1971) reversed on other grounds 258 So.2d 1 (Fla. 1972), affirmed 414 U.S. 260 (1973).

The trial court also found that the seizure of the blue van containing Petitioner was justifiable pursuant to "founded suspicion" of criminal activity.

The circumstances surrounding the seizure in the case sub judice were that a beige van loaded with marijuana

was stopped on a non-throughway dirt road at 9:00 p.m. in Parkland, a small community of 375 people. No blacks live in Parkland and the black driver of the vehicle was not recognized by the police. The beige van contained 1,500 pounds of marijuana (R 27, 31, 34, 37).

The police believed another vehicle, an older model, dark blue or green Pontiac sedan had guided the van through the area (R 35-37, 63). Shortly thereafter, a blue van, containing Petitioner, was spotted driving along the same dirt, non-through way road. The blue van approached the site of the stop at a very slow rate of speed, 5 miles per hour (R 69). The blue van and its occupants were not recognized by the police officers (R 70, 78)

even though the officers could recognize ninety per cent of the vehicles in Parkland (R 63). The blue van was travelling in the same direction as the first van (R 63, 65). The dirt, non-throughway road on which both vans travelled was a residential road with no businesses or warehouses on the road (R 81). The police noted that the occupants of the blue van were all paying attention to the cars on the side of the road,even though police blue lights were not on and only emergency flashers were blinking. Despite its slow rate of speed, 5 miles per hour, the blue van hit the berm on the side of the road twice (R 66, 69). In light of the 1,500 pounds of marijuana seized from the beige van and the prior sighting of

the dark blue or green Pontiac sedan which was apparently guiding the beige van through the area (R 63, 31), the police were justified in suspecting an organized group of marijuana distributors. The police was also justified in believing that vans were used by these marijuana distributors and that the dirt, non-through way, residential road on which the beige van was stopped was the route used. The police officers, who were capable of recognizing 90% of the vehicles in the community were aware that the blue van and beige van, which preceded it by a half hour, were not from the community. Given these circumstances the police acted reasonably when they stopped the blue van. See, Terry v. Ohio, supra.

Contrary to Petitioner's assertion, the blue van was not stopped merely because its driver and one of the two passengers were black. As discussed above, numerous factors existed which resulted in a finding of founded suspicion. While a racial or ethnic characteristic alone is not sufficient to justify a founded suspicion stop, United States v. Brignoni-Ponce, 422 U.S. 873, 885-886 (1975), such characteristic along with other factors assessed in light of the police officer's experience, can, and in the case sub judice did, amount to founded suspicion to justify the stop.

Unlike Brown v. Texas, 443 U.S. 47 (1979) where the defendant was stopped in an alley in an area with high incidence of crime on the basis that he

looked suspicious and that he had never been seen in the area before, the Petitioner's van was stopped on a residential dirt road at night after another van with 1,500 pounds of marijuana had been stopped. The driver of Petitioner's van fit the same description as that of the prior van. The actions taken by the occupants of Petitioner's van, i.e. driving at 5 miles per hour and displaying a great deal of curiosity concerning the prior van, gave rise to further suspicion. In sum, the circumstances surrounding the stop gave rise to founded suspicion and the stop was reasonable. See United States v. Harper, 617 F.2d 35, 40 (4th Cir. 1980).

CONCLUSION

In light of the foregoing Argument, Respondent respectfully requests that this Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to Jon H. Gutmacher, Esquire, Advocate Building, Suite 301, 315 S.E. Seventh Street, Fort Lauderdale, FL 33301, this 19th day of December, 1980.

Of Counsel